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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 13–17) is reported at 499 F. 2d 1109.

JURISDICTION

The *en banc* judgment of the court of appeals (A. 18) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The petition was filed on that date and was granted on October 15, 1974 (A. 19). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, in order to question persons in the vehicle concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained solely as a result of the stop and questioning and not as a result of any subsequent search.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

2. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.
>
> (b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of violating 8 U.S.C. 1324(a)(2), transporting aliens who were

present in this country illegally. He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2, to be commenced upon release from confinement or parole (A. 11–12).

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (A. 5–6). The officers were parked off the highway at the site of a permanent immigration checkpoint that was closed because of inclement weather and a shortage of manpower (A. 6). The patrol car was parked at a 90-degree angle to the highway with its headlights on, enabling the officers to see the occupants of passing vehicles (A. 6, 9).[1] During the early evening hours, they observed, traveling north, a vehicle driven by respondent and containing two passengers. The officers pursued and stopped the car for a "routine immigration inspection," because they observed that its three occupants appeared to be of Mexican descent (A. 6–9).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the

[1] The San Clemente checkpoint, at which the officers were parked, is approximately 62 air miles and 66 road miles north of the Mexican border. *United States* v. *Baca*, 368 F. Supp. 398, 410 (S.D. Cal.). The validity of a warrantless *search* of a vehicle for aliens at that checkpoint, conducted as part of the checkpoint's normal operation, is before this Court in *United States* v. *Ortiz*, No. 73–2050.

officers discovered that they spoke no English and had no papers authorizing them to be in the United States (A. 7). Respondent and the passengers were then arrested (A. 8). At trial, both passengers testified that they were Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard at the time of trial (A. 10). The district court formally denied the motion three months after the trial had ended (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit thereafter held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision in *Almeida-Sanchez* (*United States* v. *Peltier*, 500 F. 2d 985, certiorari granted, November 11, 1974, No. 73–2000). The Ninth Circuit also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints (*United States* v. *Bowen*, 500 F. 2d

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960, certiorari granted, October 15, 1974, No. 73–6848).[2]

In the present case, the court of appeals, sitting *en banc,* reversed respondent's conviction (A. 13–17). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). The court therefore determined, pursuant to its prior decision in *Peltier,* that the principles of *Almeida-Sanchez* were applicable even though the stop occurred prior to this Court's decision in that case (*ibid.*).

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (A. 15). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *."

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless searches of automobiles for aliens at fixed checkpoints. We argue in *Bowen* and in *United States* v. *Ortiz*, No. 73–2050, that warrants should not be required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply in the Ninth Circuit to checkpoint searches that occurred prior to that court's decision in *Bowen.*

The court reasoned, however, that this Court's opinion in *Almeida-Sanchez* "reflects at least as much concern with the initial stop as with the subsequent search" (A. 15).

The court concluded that a warrantless stop of a vehicle is permissible only if the officers have information that creates "a founded suspicion" that one or more occupants of the vehicle are aliens whose presence in this country is unlawful (A. 17). Although not disputing that the officers here had reason to believe that respondent and his passengers were aliens, the court held that they "did not possess facts which constituted a founded suspicion that [respondent] or his passengers were *illegal* aliens" (*ibid.;* emphasis added). The court therefore concluded that "the stop and interrogation * * * were illegal, and the fruits of the illegal conduct were inadmissible" (*ibid.*).

The court refused to "adopt the approach taken by our brothers on the Tenth Circuit" (A. 15) in *United States* v. *Bowman,* 487 F. 2d 1229, in which that court held that the stopping of an automobile "for the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

ARGUMENT

BORDER PATROL OFFICERS MAY, WITHOUT A WARRANT, LAWFULLY STOP A VEHICLE IN THE AREA OF THE MEXICAN BORDER TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE OR REMAIN IN THE UNITED STATES

A. INTRODUCTION AND SUMMARY

This case is similar to *Almeida-Sanchez* insofar as both involve roving patrol operations [3] in the Mexican border area, conducted as part of the Border Patrol's overall program to enforce the Nation's immigration laws. The present case differs from *Almeida-Sanchez*, however, in one important respect. Whereas the marihuana that formed the basis of the prosecution in *Almeida-Sanchez* was discovered under the back seat of the defendant's automobile in the course of a search for concealed aliens, the evidence that was held inadmissible by the court of appeals in the present case was derived solely from "the stop and interrogation of Brignoni-Ponce and the passengers in his car" (A. 17). There is no contention that any evidence introduced at respondent's trial was the fruit of an unlawful search of his automobile.

The only question presented here, therefore, is whether the warrantless roving patrol stop of respondent's vehicle by Border Patrol officers, in order

[3] The court of appeals in the present case, recognizing that "the line between a roving-patrol stop and fixed-checkpoint stop is not a clear one," concluded that "pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). Though we think the question is a close one, we do not here dispute the court's conclusion.

to question the vehicle's occupants concerning their right to be or remain in the United States, violated the Fourth Amendment and requires suppression of the evidence derived therefrom.[4]

Two inquiries are necessary to determine the lawfulness of the stop. First, what is the nature and quantum of cause necessary, in the area of the Mexican border, to justify a stop of a car and an inquiry into the citizenship status of its occupants? Second, may such a stop properly be made without advance judicial approval through the warrant procedure?

Looking first to the question of cause, we argue in this brief that the stop of respondent's automobile was properly predicated upon an area-wide equivalent of probable cause that would have justified not merely a brief stop for interrogation but even a limited search of the vehicle for aliens. Because of the unique conditions and difficult law enforcement problems in the Mexican border areas, it may be reasonable to

[4] The stop of respondent's vehicle occurred prior to this Court's decision in *Almeida-Sanchez*. In *United States* v. *Peltier*, No. 73-2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to *Almeida-Sanchez*. If the Court agrees with our contention in *Peltier*, we assume that the exclusionary rule would also be inapplicable to a pre-*Almeida-Sanchez* stop for interrogation *without* a search. We do not urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal here, however, because respondent's case was the vehicle for an extension of *Almeida-Sanchez* by the Ninth Circuit. If this Court holds that warrantless stops are unlawful, then we would agree, in line with our position in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848, that respondent should be given the benefit of that new rule.

stop a vehicle to ask the occupants about their right to be or remain in this country even though the officers lack an articulable suspicion that the particular vehicle to be stopped contains illegal aliens.

Turning to the warrant issue, we then argue that advance judicial approval of such a stop through the warrant procedure is not necessary to ensure the reasonableness of so brief and limited an interference with the privacy interests of the traveling public. Although Mr. Justice Powell concluded in *Almeida-Sanchez* that an area warrant was required to justify a roving patrol *search* of a vehicle for aliens, a brief stop for questioning, which ordinarily takes less than a minute and requires no more of the occupants than a response to one or two questions and possibly the production of an immigration document, is a far less drastic intrusion than a search of the vehicle for aliens. In view of the important governmental interest in making such stops, the difficulty of adapting most roving patrol operations to an area warrant procedure, and the limited scope of the resulting interference with highway travel, a routine investigative stop in the border area, made by Border Patrol officers pursuant to express statutory authority, is not an unreasonable seizure under the Fourth Amendment even though conducted without an area warrant.

B. THERE EXISTS AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE THAT JUSTIFIES A BRIEF STOP OF A VEHICLE IN THE MEXICAN BORDER AREA TO INQUIRE ABOUT THE CITIZENSHIP OF ITS OCCUPANTS

1. The decision of the court of appeals rests upon a fundamental misconception concerning the nature of

the cause necessary to justify a stop of a vehicle in the border areas. The court held that the investigating officers must "possess facts" amounting to "a founded suspicion" that the particular vehicle to be stopped contains aliens illegally present in this country (A. 17).

It is true that in the usual case the permissible reason for a search or seizure must be focused with particularity upon the person or object to be searched or seized. But this Court has recognized that the probable cause requirement may be satisfied in some circumstances by knowledge of conditions in an "area as a whole" rather than by "specific knowledge" with respect to the particular object of a search (*Camara* v. *Municipal Court*, 387 U.S. 523, 536, 538).

Camara involved a city-wide program of routine and periodic building inspections to identify housing code violations. This Court ruled that the constitutionality of any particular inspection turned not upon the existence of probable cause to believe that a violation would be uncovered in the particular building to be inspected, but upon the reasonableness of the inspection program itself. "[T]he agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held that, if entry to a particular building were refused, a warrant could be issued on the basis of this area-wide probable cause, "if reasonable legislative or administrative standards for conducting an area inspection are satis-

fied with respect to a particular dwelling" (*id.* at 538). See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72; *United States* v. *Biswell,* 406 U.S. 311.

We argued in *Almeida-Sanchez* that the Border Patrol's traffic checking procedures in the area of the Mexican border were essential to the effective enforcement of this country's immigration laws and that roving patrol searches could be justified on the basis of an area-wide probable cause like that in *Camara.* Though the Court held that such searches could not, in any event, be deemed reasonable in the absence of a warrant, the majority opinion did not reject the applicability of area-wide probable cause in this context, and both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion (joined by the Chief Justice and Justices Blackmun and Rehnquist) agreed that the probable cause principles of *Camara* may be applicable to the Border Patrol's roving patrol search operations.

Mr. Justice Powell stated that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279). Because many illegal entrants "cross the border on foot, or at places other than established [border] checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276–277). "[O]n appropriate facts," however, "the Government can

satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles" (*id.* at 281).[3]

As we show in our brief in *United States* v. *Ortiz,* No. 73–2050, pp. 20–32, the factors that persuaded Mr. Justice Powell that roving patrol searches could be justified in the border areas on the basis of this area-wide "functional equivalent of probable cause" (413 U.S. at 277) are at least as strong today as they were at the time of the decision in *Almeida-Sanchez.* There is no need to repeat here what we said in our brief in *Almeida-Sanchez* and what we reiterated in our brief in *Ortiz.* It is enough to say that the high concentration of illegal aliens in the Mexican border area, the absence of any reasonable law enforcement alternative to conducting roving patrol searches, and the consistent judicial approval of such searches prior to *Almeida-Sanchez* combine to justify, on an area-wide basis, the modest intrusion caused by a limited roving patrol search of a vehicle for aliens. Though a warrant is required for such a search under *Almeida-Sanchez,* it may be issued without a showing that there

[3] Mr. Justice Powell concluded, however, that a warrant should be required for such searches. The dissenting Justices, though disputing the need for a warrant, agreed that area-wide probable cause would satisfy the Fourth Amendment's requirements for issuance of warrants. Mr. Justice White stated: "[A]t least one Justice, Mr. Justice Powell, would uphold searches by roving patrols if authorized by an area warrant issued on less than probable cause in the traditional sense. I agree with Mr. Justice Powell that such a warrant so issued would satisfy the Fourth Amendment, and I expect such warrants would be readily issued" (413 U.S. at 288).

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is reason to believe that any particular vehicle is carrying a concealed alien.

The present case involves only a brief stop of a vehicle to question its occupants concerning their right to be or remain in the United States, and this Court has held that an investigative stop by a law enforcement officer may be justified on less than probable cause. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio,* 392 U.S. 1, 22; see also *Adams* v. *Williams,* 407 U.S. 143.

When *Terry* is read together with *Camara* and the concurring and dissenting opinions in *Almeida-Sanchez,* this is what emerges. An investigative stop of an automobile to inquire into the citizenship status of its occupants may be made on the basis of reasonable suspicion not amounting to probable cause, but that suspicion, like the probable cause in *Camara,* need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole. The conditions in border areas are such that investigative roving patrol stops, like the more intrusive roving patrol searches, are essential to the effective enforcement of the immigration laws.[6] Since those conditions may

[6] "[I]f immigration authorities were unable to question aliens as to their right to be in this country without some independent evidence that they were here illegally, their job would be impossible." *United States* v. *Montez-Hernandez,* 291 F. Supp. 712, 715 (E.D. Cal.).

provide "a constitutionally adequate equivalent of probable cause" (413 U.S. at 279) to conduct a roving patrol search, it follows *a fortiori* that the same conditions may constitute sufficient cause to conduct a far less intrusive stop for questioning.

We submit, therefore, that the court of appeals erred in holding that the Fourth Amendment could be satisfied only upon the basis of particularized suspicion with respect to each vehicle stopped. Putting aside for a moment the question whether a warrant is required, it is our submission that the same area-wide equivalent of probable cause that at least five Justices thought could justify a roving patrol search in *Almeida-Sanchez* also may justify the lesser intrusion involved in a brief investigative stop.

Prior to this Court's decision in *Almeida-Sanchez,* the courts of appeals had uniformly upheld investigative stops of vehicles in the Mexican border areas without requiring particularized suspicion. *E.g., Ramirez* v. *United States,* 263 F. 2d 385 (C.A. 5); *Contreras* v. *United States,* 291 F. 2d 63 (C.A. 9); *Fernandez* v. *United States,* 321 F. 2d 283 (C.A. 9); *United States* v. *Campos,* 471 F. 2d 296 (C.A. 9); *United States* v. *Saldana,* 453 F. 2d 352 (C.A. 10); *Roa-Rodriquez* v. *United States,* 410 F. 2d 1206 (C.A. 10).[7] Even after *Almeida-Sanchez,* the Tenth Circuit

[7] In many cases in which the courts considered the legality of a search of a vehicle, the lawfulness of the initial stop was unquestioned. See, *e.g., United States* v. *Wright,* 476 F. 2d 1027 (C.A. 5), certiorari denied, 414 U.S. 821; *United States* v. *McDaniel,* 463 F. 2d 129 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *Marin,* 444 F. 2d 86 (C.A. 9); *Fumagalli* v. *United States,* 429 F. 2d 1011 (C.A. 9); *United States* v.

adhered to its view that the Fourth Amendment is not violated when Border Patrol officers, without a warrant, stop a vehicle "to make routine inquiries as to an individual's nationality" (*United States* v. *Bowman, supra,* 487 F. 2d at 1231).[7]

2. A word should be said, however, about the relationship between what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other hand.

Arey, 428 F. 2d 1159 (C.A. 9), certiorari denied, 400 U.S. 903; *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9); *United States* v. *McCormick*, 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927.

Outside the border areas, and in the context of personal encounters rather than highway stops, some courts have applied different rules. In the District of Columbia Circuit, for example, "forcible detentions of a temporary nature for purposes of interrogation" were permitted "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is *illegally* in the country." *Au Yi Lau* v. *Immigration and Naturalization Service*, 445 F. 2d 217, 223 (emphasis added); see also *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F. 2d 683 (C.A. D.C.); *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F. 2d 1123 (C.A. D.C.); *United States* v. *Cho Po Sun*, 409 F. 2d 489 (C.A. 2), certiorari denied, 396 U.S. 864. Though we do not necessarily agree that the D.C. Circuit's standard is correct, we note that the conditions that give rise to area-wide probable cause in the border areas may not be present in other locations.

[8] See also *United States* v. *Newman*, 490 F. 2d 993, 995 (C.A. 10). The Fifth Circuit has not had occasion to decide the question since the decision in *Almeida-Sanchez*. One panel, however, expressed "serious doubt" as to the continued validity of warrantless stops for interrogation. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

Section 287(a) of the Act, 8 U.S.C. 1357(a), gives Border Patrol officers the "power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States [and] * * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." The term "reasonable distance" as used in subsection (3) is defined by 8 C.F.R. 287.1(a)(2) as "within 100 air miles from any external boundary of the United States * * *."

The search authority conferred by subsection (3) is not conditioned upon the existence of any particularized knowledge. The Border Patrol is authorized to search "*any* vehicle" (emphasis added). That authority may be exercised, however, only within a reasonable distance from an external boundary, and the scope of the search power is limited to places in a vehicle where a human being could reasonably be concealed.[9] Obviously, the power conferred by subsection (3) to conduct a limited search of any vehicle in the border area necessarily comprehends the power to *stop* any vehicle in that area and to ask questions of its occupants to determine whether the vehicle contains concealed aliens.

The interrogation authority conferred by subsection (1), unlike the search authority conferred by subsection (3), is not limited to a reasonable distance

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[9] As we indicated in our brief in *Ortiz* (p. 29), an automobile inspection is usually limited to a brief look in the trunk but occasionally extends to a look under the hood, beneath the chassis, or behind the back seat.

from an external boundary. Its exercise, however, is conditioned upon the existence of some particularized knowledge concerning the person to be questioned. He must be an "alien or person believed to be an alien * * *." Moreover, the questioning under subsection (1) may extend only to the person's "right to be or to remain in the United States."

Thus, when the two subsections are read together, they authorize the Border Patrol to conduct the following investigative activity without a warrant. Within a reasonable distance from an external boundary, officers may stop *any* vehicle, may question its occupants concerning both their right to be in the United States and the possibility that aliens may be concealed in the vehicle, and may search the vehicle for aliens. Outside a reasonable distance from an external boundary, Border Patrol officers may stop only those vehicles containing persons whom the officers believe to be aliens, may question those persons only as to their right to be or to remain in the United States, and may search a vehicle only upon particularized probable cause.

The statute represents the considered judgment of Congress that the measures it authorizes are essential to the effective enforcement of the immigration laws and consistent with the reasonableness standard of the Fourth Amendment. *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 291, 293 (Mr. Justice White dissenting). That judgment is entitled to considerable respect. See *United States* v. *Biswell, supra,* 406 U.S. at 315–317; *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 76. Insofar as the

judgment is incorrect, however, the authority conferred by the statute is ultimately circumscribed by the Fourth Amendment, for "[i]t is clear * * * that no Act of Congress can authorize a violation of the Constitution" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 272).

Thus, in *Almeida-Sanchez* this Court held that a roving patrol search conducted without a warrant pursuant to the authority conferred by subsection (3) nevertheless violated the Fourth Amendment. And we acknowledged in *Almeida-Sanchez* that routine searches of vehicles for aliens in Times Square would be "unreasonable" in the constitutional sense, even though it is technically within a "reasonable distance" of an external boundary as that term is defined by the regulation. The conditions in New York City would not provide an area-wide equivalent of probable cause sufficient to justify the practice of conducting such searches.[10]

But even if a statute authorizes law enforcement conduct that might in some circumstances be regarded as unreasonable under the Fourth Amendment, that does not mean that the authorized conduct must be viewed as unreasonable in *all* circumstances. It may be, for example, that a Border Patrol law enforce-

[10] The Immigration and Naturalization Service, of course, has never claimed or exercised any authority to conduct such searches in New York or similar places. The Border Patrol has conducted routine searches of vehicles for aliens only in the area of this country's border with Mexico, where illegal entry is a serious problem and where the concentration of illegal entrants is high, and occasionally in the area of the Canadian border when seasonal and other circumstances lead to increased border-crossing violations.

ment method apparently authorized by statute would be unreasonable if used in Times Square but quite reasonable if used near El Paso, Texas, a mile or two from the Mexican border. The official conduct should not be regarded as unconstitutional when it occurs in El Paso simply because it might be unconstitutional if it occurred in New York.

The Border Patrol officers in the present case were observing traffic in a patrol car at the closed San Clemente checkpoint, located in an area known to have a high incidence of illegal alien traffic. The checkpoint "straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north," and it has been described as "the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (*United States* v. *Baca*, 368 F. Supp. 398, 410, 415 (S.D. Cal.)). More than 12,000 deportable aliens were apprehended at the checkpoint in fiscal year 1973, and in normal operation it is common for an eight-hour shift to result in as many as 20 or 30 apprehensions (*id.* at 410).

Against this background, it is not difficult to understand why Border Patrol Agents Brady and Harkins acted as they did when they observed respondent's northbound vehicle pass the checkpoint containing three persons who appeared to be of Mexican descent. Though the officers had no particularized suspicion that those individuals were illegally present in the country, the circumstances made it appropriate to stop the vehicle briefly to inquire whether they were citizens of the United States or had a right to be here. We

contend that this minimally intrusive conduct was authorized by both subsections of 8 U.S.C. 1357(a) and that it was reasonable under the Fourth Amendment—putting aside, again, the question whether a warrant was required—because it was predicated upon an area-wide equivalent of probable cause or reasonable suspicion.

The authority conferred by subsection (1) of the statute is not limited to exercise within a reasonable distance from an external boundary, and it is true that we read that subsection, in the court of appeals' words, as permitting "immigration officials [to] stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens" (A. 15). But there is no need to consider in *this* case whether there would have been sufficient cause to make a similar stop for questioning in Omaha, Nebraska, or Nashville, Tennessee.

It may be that outside the Mexican border area there would be no comparable "functional equivalent of probable cause" to justify the kind of stop that was made here, even though subsection (1) would appear to authorize it. The only question to be answered in this case, however, is whether such area-wide probable cause exists in the border region where respondent's vehicle was in fact stopped. If, as we have shown, there was sufficient area-wide cause to justify the stop involved here, then it should not

matter whether sufficient cause would exist to make a similar stop elsewhere.[11]

C. ADVANCE JUDICIAL APPROVAL THROUGH THE WARRANT PROCEDURE IS NOT NECESSARY TO ENSURE THE REASONABLENESS OF A BRIEF INVESTIGATIVE STOP OF A VEHICLE

If, as we have shown, the Border Patrol officers had sufficient cause to stop respondent's vehicle in order to inquire about the citizenship status of its occupants, there remains the question—which the court of appeals did not address—whether advance judicial approval in the form of an area warrant, required by this Court for a roving patrol *search* in *Almeida-Sanchez,* should also be required for the kind of brief roving patrol stop and questioning that took place in this case.[12]

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[11] Similarly, although we believe that Border Patrol officers may, under 8 U.S.C. 1357(a)(3), lawfully make routine vehicle stops *in the border areas* even when they do not have reason to believe that the occupants of the vehicle may be aliens, that issue need not be decided in this case. Border Patrol Agent Brady testified that respondent's vehicle was stopped because the people in the car appeared to be of Mexican descent (A. 9). All that must be decided here, therefore, is whether the authority conferred by subsection (1) to interrogate persons believed to be aliens may be exercised by stopping vehicles containing such persons for brief questioning within the Mexican border areas.

[12] The Ninth Circuit has held that the particularized suspicion requirement for roving patrol stops that was announced in this case extends also to stops at fixed checkpoints in the course of their normal operation. *United States* v. *Esquer-Rivera*, Nos. 74–1110, *et al.*, decided July 1, 1974. If this Court agrees with our contention in *Ortiz* that searches of vehicles for aliens may be conducted at fixed checkpoints routinely and without a warrant, it would follow that stops for questioning at such checkpoints may also be made routinely and without a warrant. But even if the Court holds that warrants are required for checkpoint searches, we would argue that warrants are not required for brief stops for questioning at checkpoints. Our analysis here with respect to roving patrol stops would apply as well to checkpoint stops.

Our contention can be stated quite simply. The "seizure" involved in this case was so limited an intrusion into the privacy interests protected by the Fourth Amendment that the interposition of a magistrate was unnecessary to ensure its reasonableness.[13] Just as the nature of the cause necessary to justify a particular search or seizure depends in part upon the extent of the intrusion contemplated (*Terry* v. *Ohio,* 392 U.S. 1, 17–18, n. 15), so should the need for a warrant turn in part upon the scope of the official interference with protected interests.

This is so because "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady* v. *Dombrowski,* 413 U.S. 433, 439). Although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" or seizure (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 277, Mr. Justice Powell concurring), there are some circumstances in which a search or seizure may be reasonable without a warrant or without probable cause or even without both (*ibid.*). This is "the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of

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[13] We acknowledge that even a brief stop of a vehicle to make a limited inquiry about a person's nationality may be a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio*, *supra*, 392 U.S. at 19 and n. 16).

the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U.S. at 19).

The absence of a warrant for a particular search or seizure may raise warning signals, but whether that absence makes the search or seizure unreasonable depends at least in part upon the nature and scope of the intrusion.[14] For example, "broad and unsuspected governmental incursions into conversational privacy [through] electronic surveillance" may "jeopard[ize] * * * constitutionally protected speech" and, particularly when directed against "those suspected of unorthodoxy in their political beliefs," may make "Fourth Amendment protections * * * the more necessary" (*United States* v. *United States District Court,* 407 U.S. 297, 313–314). The magnitude of "the potential danger posed by unreasonable surveillance to individual privacy and free expression" (*id.* at 315) heightens the "risk" involved in relying solely on "unreviewed executive discretion" as a guarantee of reasonableness (*id.* at 317). In those circumstances, this Court concluded that "the needs of citizens for privacy and free expression may * * * be better protected by requiring a warrant before such surveillance is undertaken" (*id.* at 315).

When law enforcement officers use less "constitutionally sensitive means in pursuing their tasks" (*id.*

[14] The test in these cases, as this Court has held, is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *United States* v. *Edwards,* 415 U.S. 800, 807; see *Cooper* v. *California,* 386 U.S. 58, 62.

at 317), however, a warrant may not always be required. An on-the-street investigative stop of a suspicious individual and a frisk of his person for concealed weapons may be conducted by a law enforcement officer without a warrant (*Terry* v. *Ohio, supra*).[15] Similarly, four members of this Court concluded in *Cardwell* v. *Lewis,* No. 72–1603, decided June 17, 1974, that the scraping of paint from the exterior of an automobile did not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect" (slip op. 5, plurality opinion).

The brief stop of a vehicle in the border area to ask its occupants a few questions about their citizenship and right to be in the United States, while not trivial, does not constitute the kind of instrusion into protected privacy interests that was involved in even the limited search for aliens conducted in *Almeida-Sanchez.* The Immigration and Naturalization Service informs us that a stop for questioning at a checkpoint ordinarily takes no more than about 5 seconds per occupant and that even a roving patrol stop for questioning usually consumes no more than a minute. Such stops involve no search unless the officers have particularized probable cause. All that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.

[15] Of course, in the *Terry* context no warrant could have been obtained, since there was neither area probable cause nor individualized probable cause.

We submit that this momentary verbal encounter does not present the sort of dangers that a warrant is designed to protect against. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268). A brief stop for questioning is a far less "constitutionally sensitive" (*United States* v. *United States District Court, supra,* 407 U.S. at 317) law enforcement method than a stop and search, and we believe that the need for and utility of advance judicial approval are correspondingly reduced.

Moreover, roving patrol operations are not easily adapted to an area warrant procedure. Roving patrol traffic checking operations are considered by the Border Patrol to be essential to supplement the fixed checkpoints as part of an overall program to deter illegal entry and apprehend illegal entrants. Although the need for som roving patrols—to cover one or two roads that bypass a major fixed checkpoint, for example—may be sufficiently foreseeable to permit advance planning, most roving patrol traffic checking operations can be employed effectively only if they can be used flexibly.

Basic roving patrol strategy is established on a regional basis, but the deployment of particular patrol cars and agents is ordinarily determined by field supervisors, who must take account of such variable factors as the season, the weather, the traffic flow, the time of day, manpower and patrol car availability, recent experience on a road or roads, information con-

cerning illegal activity, and so on. In areas with many bypass roads, one patrol car may be assigned to cover 10 or more roads and many square miles during a single shift.

For these reasons, the need for and assignment of roving patrols ordinarily cannot be anticipated for a future period but must be determined on a day-to-day basis consistent with regional policy.[16] Weekly or monthly warrants would therefore not be feasible. The Border Patrol has found that it would be impractical to seek daily warrants for each patrol car, in part because that would require an inordinate commitment of resources to the preparation of information to be presented in support of warrant applications. After this Court's decision in *Almeida-Sanchez,* therefore, the Border Patrol effectively discontinued the use of roving patrol traffic checking operations except when specific information was obtained concerning possible smuggling operations.

Even if these practical problems were not considered sufficiently disruptive of the Border Patrol's enforcement program to justify a roving patrol *search* without a warrant,[17] we submit that the balance of reasonableness shifts when the contemplated intrusion is limited to a brief investigative stop. The

[16] The instant case is illustrative of the problem. The "roving patrol" operation here involved was in response to immediate and unanticipated weather and manpower exigencies.

[17] Mr. Justice Powell stated in *Almeida-Sanchez* that "the roving searches are apparently planned in advance or carried out according to a predetermined schedule" (413 U.S. at 283). As we have indicated, that is true only with respect to a minority of roving patrol traffic checking operations.

result here should reflect the substantial difference between the intrusiveness of a search and the intrusiveness of a momentary "seizure."[18]

The situation here, we submit, is similar to that in *United States* v. *Biswell, supra,* where this Court upheld as "reasonable official conduct under the Fourth Amendment" (406 U.S. at 316) a warrantless search of a federally licensed firearms dealer's locked storeroom, conducted pursuant to an inspection program that was authorized by statute. Although, as Mr. Justice Powell stated in *Almeida-Sanchez,* "[o]ne who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite" (413 U.S. at 281), drivers and motor vehicles are licensed by the states, and the lower federal courts have upheld routine warrantless stops of vehicles for license and registration checks.[19] A roving patrol immigration

[18] One district court aptly stated: "It cannot be considered an arbitrary invasion of privacy merely to ask for proper identification in an area known to contain large numbers of illegal Mexican aliens, particularly when the person being questioned gives the appearance of being nervous and being of Mexican ancestry. This is especially true when it is the only feasible way to apprehend the seemingly endless parade of aliens who escape detection at the border" (*United States* v. *Montez-Hernandez, supra,* 291 F. Supp. at 716).

[19] See, *e.g., United States* v. *Croft,* 429 F. 2d 884 (C.A. 10); *Myricks* v. *United States,* 370 F. 2d 901 (C.A. 5), certiorari denied, 386 U.S. 1015; *Lipton* v. *United States,* 348 F. 2d 591 (C.A. 9). See generally Note, *Automobile License Checks and the Fourth Amendment,* 60 Virginia L. Rev. 666 (1974); Comment, *Freedom of the Road: Public Safety* v. *Private Right,* 14 DePaul L. Rev. 381, 407–409 (1965); Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles,* 51 Calif. L. Rev. 907 (1963); Note, *Random Road Blocks and the Law of Search and Seizure,* 46 Iowa L. Rev. 802 (1961); Note, *The Driver's License "Display" Statute: Problems Arising from Its Application,* 1960 Wash. U.L.Q. 279.

stop, though not part of any state highway safety inspection program, is no more intrusive than the routine license check with which most motorists are familiar.

Moreover, as in *Biswell,* "the prerequisite of a warrant could easily frustrate" the enforcement scheme; "and if the necessary flexibility * * * is to be preserved, the protections afforded by a warrant would be negligible" (406 U.S. at 316). Warrantless roving patrol investigative stops, like the unannounced inspections of firearms dealers in *Biswell,* are specifically authorized by statute. The Court's conclusion in *Biswell* thus bears as well upon the resolution of the issue here. The Court there had "little difficulty in concluding that where * * * regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute" (*id.* at 317).

Although immigration stops may not be "regulatory inspections" in furtherance of a licensing scheme, they involve a far less drastic intrusion than the unannounced searches sanctioned in *Biswell.* "[T]he possibilities of abuse and the threat to privacy" are of even less "impressive dimensions" in this context than in *Biswell* (*ibid.*).

Taking into account that "Congress has broad

authority to fashion standards of reasonableness for searches and seizures" (*Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 77), we believe that Border Patrol officers may lawfully exercise their express statutory authority to make brief vehicle stops without warrants to inquire about the citizenship of the occupants. These limited intrusions do not pose the kind of dangers that might make it necessary to disregard the congressional judgment that warrants are not needed to ensure the reasonableness of the law enforcement conduct.

In arguing that a roving patrol investigative stop is not *per se* unreasonable if made without a warrant, we do not mean to suggest that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was in fact unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning and in the context of an adversary proceeding on specific facts.

As we showed earlier (pp. 20–21, *supra*), the stop and questioning in this case were authorized by 8 U.S.C. 1357(a)(1) and (3) and were reasonable under the Fourth Amendment. Border Patrol Agents Brady and Harkins were observing traffic on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where thousands of illegal entrants are apprehended each

year. When they observed respondent's northbound vehicle containing three persons who appeared to be of Mexican descent, they were justified in stopping the car to question its occupants about their citizenship and their right to be in the United States. Once the vehicle was lawfully stopped, the officers' brief questioning of the passengers revealed that they were present in this country illegally.

We submit that this law enforcement action "was justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry* v. *Ohio, supra,* 392 U.S. at 20). The limited "seizure" of which respondent complains was not "unreasonable" under the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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